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17 Attorneys for Defendants  
18 AVCO CORPORATION and  
19 CARRIER CORPORATION

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**UNITED STATES DISTRICT COURT**  
**CENTRAL DISTRICT OF CALIFORNIA**

WALTER NIELSEN and ARLEEN  
NIELSEN,  
Plaintiffs,

v.

AECOM TECHNOLOGY  
CORPORATION (sued as successor to  
DANIEL, MANN, JOHNSON &  
MENDENHALL a/k/a DMJM);  
AEROJET GENERAL CORPORATION;  
AIR PRODUCTS & CHEMICALS, INC.;  
ARMCO STEEL CORPORATION (sued  
as successor-by-merger to ARMCO  
DRAINAGE AND METAL  
PRODUCTS); AVCO CORPORATION;  
CARRIER CORPORATION;  
COMPUDYNE CORPORATION;  
COSMODYNE LLC f/k/a COSMODYNE  
CORPORATION; DMJM AVIATION,  
INC.; DMJM INTERNATIONAL, INC.;  
DONALDSON COMPANY, INC. sued as  
successor-by-merger to WESTERN  
FILTER CORPORATION, INC.; FRANK  
M. BOOTH, INC.; GRINNELL LLC d/b/a  
GRINNELL CORPORATION; LEHIGH

**CASE NO. CV11-04270 SJO (Ex)**

Hon. Manuel L. Real

**ANSWER OF AVCO CORPORATION  
TO FIRST AMENDED COMPLAINT**

**Demand for Jury Trial**

**ANSWER OF AVCO CORPORATION TO FIRST AMENDED COMPLAINT**

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1 SOUTHWEST CEMENT COMPANY  
2 (sued individually and as successor-in-  
3 interest to CALAVERAS CEMENT  
4 COMPANY); LOCKHEED MARTIN  
5 CORPORATION (sued individually and  
6 as successor-in-interest to MARTIN  
7 MARIETTA COMPANY s/b/m THE  
8 GLENN L. MARTIN CO.); PACIFIC  
9 BELL TELEPHONE d/b/a AT&T  
CALIFORNIA; PARKER-HANNIFIN  
CORPORATION; PARSONS  
CORPORATION f/k/a RALPH M.  
PARSONS COMPANY; PETER KIEWIT  
SONS', INC.; UNYSIS CORPORATION  
sued individually and as successor-in-  
interest to SPERRY RAND CO s/b/m to  
REMINGTON-RAND CO);

10 Defendants.

11  
12  
13 Defendant Avco Corporation ("Defendant"), by and through its undersigned  
14 attorneys, hereby submits its Answer and Affirmative Defenses to the First Amended  
15 Complaint of plaintiffs Walter and Arleen Nielsen ("Plaintiffs"), and in defense of the  
16 allegations therein, states as follows:

17 1. In response to the paragraph 1 of the First Amended Complaint, Defendant  
18 denies that it or any of its subsidiaries was the agent, servant, employee and/or joint  
19 venture of any other defendant named in the First Amended Complaint at any time or in  
20 any context relevant to the allegations of the First Amended Complaint; and Defendant  
21 further denies that any other defendant named in the First Amended Complaint was its  
22 agent, servant, employee and/or joint venture at any time or in any context relevant to the  
23 allegations of the First Amended Complaint. Defendant is without knowledge or  
24 information sufficient to form a belief as to the truth of the allegations contained in  
25 paragraph 1 of the First Amended Complaint and on that basis denies them except that  
26 Defendant admits it is incorporated in the State of Delaware and may do business in the  
27 State of California.

1       2. Defendant is without knowledge or information sufficient to form a belief as  
2 to the truth of the allegations contained in paragraph 2 of the First Amended Complaint  
3 and on that basis denies them.

4       3. Defendant incorporates herein by reference, as though fully set forth herein,  
5 all of its responses to the prior paragraphs 1-2 as set forth above.

6       4. Defendant is without knowledge or information sufficient to form a belief as  
7 to the truth of the allegations contained in paragraph 4 of the First Amended Complaint  
8 and on that basis denies them.

9       5. Defendant is without knowledge or information sufficient to form a belief as  
10 to the truth of the allegations contained in paragraph 5 of the First Amended Complaint  
11 and on that basis denies them.

12       6. Defendant is without knowledge or information sufficient to form a belief as  
13 to the truth of the allegations contained in paragraph 6 of the First Amended Complaint  
14 and on that basis denies them. Defendant further denies any portion of the allegations  
15 attributing liability to Defendant.

16       7. Defendant is without knowledge or information sufficient to form a belief as  
17 to the truth of the allegations contained in paragraph 7 of the First Amended Complaint  
18 and on that basis denies them. Defendant further denies any portion of the allegations  
19 attributing liability to Defendant.

20       8. Defendant is without knowledge or information sufficient to form a belief as  
21 to the truth of the allegations contained in paragraph 8 of the First Amended Complaint  
22 and on that basis denies them.

23       9. Defendant is without knowledge or information sufficient to form a belief as  
24 to the truth of the allegations contained in paragraph 9 of the First Amended Complaint  
25 and on that basis denies them.

26       10. Defendant is without knowledge or information sufficient to form a belief as  
27 to the truth of the allegations contained in paragraph 10 of the First Amended Complaint

1 and on that basis denies them. Defendant further denies any portion of the allegations  
2 attributing liability to Defendant.

3       11. Defendant is without knowledge or information sufficient to form a belief as  
4 to the truth of the allegations contained in paragraph 11 of the First Amended Complaint  
5 and on that basis denies them. Defendant further denies any portion of the allegations  
6 attributing liability to Defendant.

7       12. In response to any allegations of liability in paragraph 12, Defendant denies  
8 that any of its conduct caused any injuries to plaintiffs. Defendant is without knowledge  
9 or information sufficient to form a belief as to the truth of the remaining allegations  
10 contained in paragraph 12 of the First Amended Complaint and on that basis denies them.

11       13. In response to any allegations of liability in paragraph 13, Defendant denies  
12 that any of its conduct caused any injuries to plaintiffs. Defendant is without knowledge  
13 or information sufficient to form a belief as to the truth of the remaining allegations  
14 contained in paragraph 13 of the First Amended Complaint and on that basis denies them.

15       14. In response to any allegations of liability in paragraph 14, Defendant denies  
16 that any of its conduct caused any injuries to plaintiffs. Defendant is without knowledge  
17 or information sufficient to form a belief as to the truth of the remaining allegations  
18 contained in paragraph 14 of the First Amended Complaint and on that basis denies them.

19       15. Defendant is without knowledge or information sufficient to form a belief as  
20 to the truth of the allegations contained in paragraph 15 of the First Amended Complaint  
21 and on that basis denies them. Defendant further denies any portion of the allegations  
22 attributing liability to Defendant.

23       16. Defendant is without knowledge or information sufficient to form a belief as  
24 to the truth of the allegations contained in paragraph 16 of the First Amended Complaint  
25 and on that basis denies them. Defendant further denies any portion of the allegations  
26 attributing liability to Defendant.

27       17. Defendant denies the allegations in paragraph 17 of the First Amended  
28 Complaint. Defendant is without knowledge or information sufficient to form a belief as

1 to the truth of the allegations contained in paragraph 17 of the First Amended Complaint  
2 including but not limited to the allegations regarding any third parties, other defendants,  
3 Walter Nielsen, and/or his alleged health and on that basis denies them.

4       18. Defendant denies the allegations in paragraph 18 of the First Amended  
5 Complaint. Defendant is without knowledge or information sufficient to form a belief as  
6 to the truth of the allegations contained in paragraph 18 of the First Amended Complaint  
7 including but not limited to the allegations regarding any third parties, other defendants,  
8 and/or Walter Nielsen and on that basis denies them.

9       19. Defendant denies the allegations in paragraph 19 of the First Amended  
10 Complaint. Defendant is without knowledge or information sufficient to form a belief as  
11 to the truth of the allegations contained in paragraph 19 of the First Amended Complaint  
12 including but not limited to the allegations regarding any third parties, other defendants,  
13 and/or Walter Nielsen and on that basis denies them.

14       20. Defendant denies the allegations in paragraph 20 of the First Amended  
15 Complaint. Defendant is without knowledge or information sufficient to form a belief as  
16 to the truth of the allegations contained in paragraph 20 of the First Amended Complaint  
17 including but not limited to the allegations regarding any third parties, other defendants,  
18 and/or Walter Nielsen and on that basis denies them.

19       21. Defendant denies the allegations in paragraph 21 of the First Amended  
20 Complaint. Defendant is without knowledge or information sufficient to form a belief as  
21 to the truth of the allegations contained in paragraph 21 of the First Amended Complaint  
22 including but not limited to the allegations regarding any third parties, other defendants,  
23 and/or Walter Nielsen and on that basis denies them.

24       22. Defendant denies the allegations in paragraph 22 of the First Amended  
25 Complaint. Defendant is without knowledge or information sufficient to form a belief as  
26 to the truth of the allegations contained in paragraph 22 of the First Amended Complaint  
27 including but not limited to the allegations regarding any third parties, other defendants,  
28 and/or Walter Nielsen and on that basis denies them.

1       23. Defendant incorporates herein by reference, as though fully set forth herein,  
 2 each and every one of its responses to the prior paragraphs 1-22 as set forth above.

3       24. Defendant is without knowledge or information sufficient to form a belief as  
 4 to the truth of the allegations contained in paragraph 24 of the First Amended Complaint  
 5 and on that basis denies them. Defendant further denies any portion of the allegations  
 6 attributing liability to Defendant.

7       25. Defendant is without knowledge or information sufficient to form a belief as  
 8 to the truth of the allegations contained in paragraph 25 of the First Amended Complaint  
 9 and on that basis denies them. Defendant further denies any portion of the allegations  
 10 attributing liability to Defendant.

11      26. Defendant is without knowledge or information sufficient to form a belief as  
 12 to the truth of the allegations contained in paragraph 26 of the First Amended Complaint  
 13 and on that basis denies them. Defendant further denies any portion of the allegations  
 14 attributing liability to Defendant.

15      27. Defendant is without knowledge or information sufficient to form a belief as  
 16 to the truth of the allegations contained in paragraph 27 of the First Amended Complaint  
 17 and on that basis denies them. Defendant further denies any portion of the allegations  
 18 attributing liability to Defendant.

19      28. Defendant is without knowledge or information sufficient to form a belief as  
 20 to the truth of the allegations contained in paragraph 28 of the First Amended Complaint  
 21 and on that basis denies them. In particular, Defendant is without knowledge or  
 22 information sufficient to form a belief as to the truth of the allegations contained in  
 23 paragraph 28 of the First Amended Complaint including but not limited to the allegations  
 24 regarding any third parties, other defendants, Walter Nielsen, and/or his alleged health  
 25 and on that basis denies them. Defendant further denies any portion of the allegations  
 26 attributing liability to Defendant.

27      29. Defendant denies the allegations in paragraph 29 of the First Amended  
 28 Complaint. Defendant is without knowledge or information sufficient to form a belief as

1 to the truth of the allegations contained in paragraph 29 of the First Amended Complaint  
2 including but not limited to the allegations regarding any third parties, other defendants,  
3 and/or Walter Nielsen and on that basis denies them.

4       30. Defendant denies the allegations in paragraph 30 of the First Amended  
5 Complaint. Defendant is without knowledge or information sufficient to form a belief as  
6 to the truth of the allegations contained in paragraph 30 of the First Amended Complaint  
7 including but not limited to the allegations regarding any third parties, other defendants,  
8 and/or Walter Nielsen and on that basis denies them.

9       31. Defendant denies the allegations in paragraph 31 of the First Amended  
10 Complaint. Defendant is without knowledge or information sufficient to form a belief as  
11 to the truth of the allegations contained in paragraph 31 of the First Amended Complaint  
12 including but not limited to the allegations regarding any third parties, other defendants,  
13 and/or Walter Nielsen and on that basis denies them.

14       32. Defendant denies the allegations in paragraph 32 of the First Amended  
15 Complaint. Defendant is without knowledge or information sufficient to form a belief as  
16 to the truth of the allegations contained in paragraph 32 of the First Amended Complaint  
17 including but not limited to the allegations regarding any third parties, other defendants,  
18 and/or Walter Nielsen and on that basis denies them.

19       33. Defendant denies the allegations in paragraph 33 of the First Amended  
20 Complaint. Defendant is without knowledge or information sufficient to form a belief as  
21 to the truth of the allegations contained in paragraph 33 of the First Amended Complaint  
22 including but not limited to the allegations regarding any third parties, other defendants,  
23 and/or Walter Nielsen and on that basis denies them.

24       34. Defendant incorporates herein by reference, as though fully set forth herein,  
25 each and every one of its responses to the prior paragraphs 1-33 as set forth above.

26       35. Defendant is without knowledge or information sufficient to form a belief as  
27 to the truth of the allegations contained in paragraph 35 of the First Amended Complaint  
28 and on that basis denies them.

36. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 36 of the First Amended Complaint and on that basis denies them.

37. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 37 of the First Amended Complaint and on that basis denies them.

38. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 38 of the First Amended Complaint and on that basis denies them. Defendant further denies any portion of the allegations attributing liability to Defendant.

39. Defendant denies any allegations contained in the prayer for relief in paragraph 39 and further denies any liability to Plaintiffs.

## **AFFIRMATIVE DEFENSES**

As for and for its separate, distinct, and affirmative defenses to Plaintiffs' First Amended Complaint, and to each cause of action thereof, this Answering Defendant alleges as follows:

## **FIRST AFFIRMATIVE DEFENSE**

**(FAILURE TO STATE A CAUSE OF ACTION)**

40. Defendant alleges that Plaintiffs' unverified First Amended Complaint fails to state facts sufficient to constitute a cause of action upon which relief may be granted against this Answering Defendant.

## **SECOND AFFIRMATIVE DEFENSE**

## **(CONTRIBUTORY/COMPARATIVE NEGLIGENCE)**

41. Defendant alleges, on information and belief, that any damages suffered by Plaintiffs as alleged in Plaintiffs' First Amended Complaint were proximately caused, in whole or in part, by the failure of Plaintiffs to exercise reasonable care under the circumstances and therefore Plaintiffs' recovery, if any, must be diminished by the

1 proportion of the negligence of Plaintiffs which proximately caused or contributed to  
2 Plaintiffs' alleged damages, if any.

3 **THIRD AFFIRMATIVE DEFENSE**

4 **(STATUTE OF LIMITATIONS)**

5 42. Defendant alleges on information and belief that:

6 A. Plaintiffs' First Amended Complaint is barred by the applicable  
7 statute of limitations pursuant to California Code of Civil Procedure sections 335.1, 338,  
8 339, 340.2, 343, 361, 366.1, and/or 474, and/or,

9 B. The causes of action in Plaintiffs' First Amended Complaint arose  
10 outside the State of California, while Plaintiffs were non-residents of the State of  
11 California, pursuant to the applicable statute(s) of limitations or statute(s) of repose  
12 where Plaintiffs were then residing, working, diagnosed with the injury/disease  
13 complained of, and treated for the injury/disease complained of, and Plaintiffs' First  
14 Amended Complaint is barred by the provisions of those statutes and by section 361 of  
15 the California Code of Civil Procedure.

16 **FOURTH AFFIRMATIVE DEFENSE**

17 **(IMPERMISSIBLE USE OF "DOE" AMENDMENT)**

18 43. Defendant alleges, on information and belief, that it was impermissibly  
19 named as a fictitious party in violation of California Code of Civil Procedure section 474  
20 because Plaintiffs were not ignorant of the true name and the alleged basis for the claims  
21 against this Defendant when Plaintiffs filed the controlling First Amended Complaint in  
22 this matter.

23 **FIFTH AFFIRMATIVE DEFENSE**

24 **(CONDUCT OF OTHERS)**

25 44. Defendant alleges, on information and belief, that any loss, injury, or  
26 damage to Plaintiffs were proximately caused or contributed to by the negligent or other  
27 tortious acts, omissions, and/or fault of other persons or entities which this Answering  
28 Defendant neither controlled nor had the right or duty to control, and that no injury or

1 damages of which Plaintiffs complain were caused by acts or omissions of this  
2 Answering Defendant.

**SIXTH AFFIRMATIVE DEFENSE**  
**(PROPOSITION 51)**

5       45. Defendant alleges, on information and belief, that there are other persons,  
6 parties, entities and/or defendants who are at fault and proximately caused Plaintiffs'  
7 injuries, if any. If this Answering Defendant is responsible to Plaintiffs, which  
8 responsibility is expressly denied, this Answering Defendant is only liable for its  
9 proportionate share of non-economic damages, if any, as set forth in California Civil  
10 Code section 1431.2.

**SEVENTH AFFIRMATIVE DEFENSE**  
**(NOT A SUCCESSOR-IN-INTEREST)**

13       46. Defendant denies any and all liability to the extent that Plaintiffs allege that  
14 this Answering Defendant is liable as a successor, successor in business, successor in  
15 product line or a portion thereof, assign, predecessor, predecessor in business,  
16 predecessor in product line or a portion thereof, parent, alter-ego, subsidiary, wholly or  
17 partially owned by, or the whole or partial owner of or member in any entity researching,  
18 studying, manufacturing, fabricating, designing, labeling, assembling, distribution,  
19 leasing, buying, offering for sale, selling, inspecting, servicing, installing, contracting for  
20 installation, repairing, marketing, warranting, rebranding, manufacturing for others,  
21 packaging and advertising a certain substance, the generic name of which is asbestos.

## **EIGHTH AFFIRMATIVE DEFENSE**

### **(ASSUMPTION OF RISK)**

24       47. Defendant alleges, on information and belief, that Plaintiffs voluntarily and  
25 knowingly assumed the alleged risks and alleged hazards incident to the alleged  
26 operations, acts, and conduct at the times and places alleged in Plaintiffs' First Amended  
27 Complaint, and that Plaintiffs' said acts proximately caused and contributed to Plaintiffs'  
28 alleged injuries and damages, if any.

**NINTH AFFIRMATIVE DEFENSE**  
**(FAILURE TO FOLLOW WARNINGS)**

48. Defendant alleges, on information and belief, that Plaintiffs were advised, informed, and warned of any potential hazards and/or dangers, if any, associated with the normal or foreseeable use, handling, and storage of the products, substances, and equipment described in Plaintiffs' First Amended Complaint, and Plaintiffs failed to follow such warnings.

**TENTH AFFIRMATIVE DEFENSE**  
**(LACK OF LEGAL CAPACITY TO SUE)**

49. Defendant alleges, on information and belief, that Plaintiffs lack the legal capacity to sue and are not real parties-in-interest.

**ELEVENTH AFFIRMATIVE DEFENSE**  
**(FAILURE TO MITIGATE)**

50. Defendant alleges, on information and belief, that Plaintiffs failed to mitigate the damages, if any, suffered as a result of the circumstances and injuries alleged in Plaintiffs' First Amended Complaint.

**TWELFTH AFFIRMATIVE DEFENSE**  
**(SUPERSEDING AND INTERVENING CAUSE)**

51. Defendant alleges, on information and belief, that any damages suffered by Plaintiffs were a direct and proximate result of a superseding and intervening cause of which this Answering Defendant had no control, right to control or duty to control.

**THIRTEENTH AFFIRMATIVE DEFENSE**  
**(MODIFICATION/ALTERATION OF PRODUCT)**

24       52. Defendant, on information and belief, alleges that the products which  
25 allegedly injured Plaintiffs were altered, changed, or otherwise modified by parties,  
26 individuals, or entities other than this Answering Defendant, and said modifications,  
27 changes or alterations were a direct and proximate cause of the injuries alleged by  
28 Plaintiffs, if any.

1                   **FOURTEENTH AFFIRMATIVE DEFENSE**  
2                   **(MISUSE AND ABUSE)**

3       53. Defendant, on information and belief, alleges that prior to and at the time of  
4 the injuries alleged in Plaintiffs' First Amended Complaint, the products which allegedly  
5 injured Plaintiffs were misused and abused and were not being used in the manner in  
6 which they were intended to be used. Such misuse and abuse directly and proximately  
7 caused and contributed to the injuries and damages complained of by Plaintiffs, if any.

8                   **FIFTEENTH AFFIRMATIVE DEFENSE**  
9                   **(SPOILATION OF EVIDENCE)**

10     54. Defendant alleges, on information and belief, that Plaintiffs and/or Plaintiffs'  
11 agents negligently or intentionally failed to preserve, and permitted the spoliation of,  
12 material evidence, including but not limited to the products which Plaintiffs allege give  
13 rise to Plaintiffs' First Amended Complaint herein. Such conduct bars Plaintiffs' action  
14 and/or gives rise to liability on the part of Plaintiffs for damages payable to this  
15 Answering Defendant.

16                   **SIXTEENTH AFFIRMATIVE DEFENSE**  
17                   **(NOT A SUBSTANTIAL FACTOR)**

18     55. Defendant alleges, on information and belief, that Plaintiffs were not  
19 exposed to any substance released from any product manufactured and distributed by this  
20 Answering Defendant that was a substantial factor in causing the injury, damage, or loss  
21 of which Plaintiffs complain, and, therefore, this Answering Defendant is not liable to  
22 Plaintiffs as alleged.

23                   **SEVENTEENTH AFFIRMATIVE DEFENSE**  
24                   **(LACK OF NOTICE)**

25     56. Defendant alleges, on information and belief, that Plaintiffs failed to give  
26 reasonable, timely, sufficient and adequate notice to this Answering Defendant of the  
27 alleged liability, damage or injury, if any.

1                   **EIGHTEENTH AFFIRMATIVE DEFENSE**  
2                   **(LACHES)**

3       57. Defendant alleges, on information and belief, that Plaintiffs have  
4       unreasonably delayed in filing and serving this action, without good cause therefore.  
5       Said delay has directly resulted in prejudice to this Answering Defendant, and therefore,  
6       this action is barred by the doctrine of laches.

7                   **NINETEENTH AFFIRMATIVE DEFENSE**  
8                   **(UNCLEAN HANDS)**

9       58. Defendant alleges, on information and belief, that Plaintiffs are precluded  
10      from maintaining any cause of action against this Answering Defendant because  
11      Plaintiffs' actions preclude equitable relief under the doctrine of unclean hands.

12                  **TWENTIETH AFFIRMATIVE DEFENSE**  
13                  **(SOPHISTICATED USER)**

14       59. Defendant states, on information and belief, that Plaintiffs and/or their  
15      employers were sophisticated users of the products and/or substances referred to in the  
16      First Amended Complaint and therefore their claims against Defendant are barred as  
17      articulated in *Johnson v. American Standard* (2008) 74 Cal.Rptr.3d 108.

18                  **TWENTY-FIRST AFFIRMATIVE DEFENSE**  
19                  **(SOPHISTICATED INTERMEDIARY)**

20       60. Defendant states, on information and belief, that Plaintiffs' claims are barred  
21      by application of the sophisticated intermediary defense.

22                  **TWENTY-SECOND AFFIRMATIVE DEFENSE**  
23                  **(NO WARRANTY)**

24       61. This First Amended Answering Defendant gave no warranties, either  
25      express or implied, to Plaintiffs.

1                   **TWENTY-THIRD AFFIRMATIVE DEFENSE**  
2                   **(LACK OF PRIVITY)**

3         62. At all times and places mentioned in Plaintiffs' First Amended Complaint,  
4 Defendant alleges, on information and belief, that Plaintiffs were not in privity of  
5 contract with this Answering Defendant and said lack of privity bars Plaintiffs' recovery  
6 herein upon any theory of warranty.

7                   **TWENTY-FOURTH AFFIRMATIVE DEFENSE**  
8                   **(VAGUENESS OF DEFECT STANDARDS)**

9         63. The State of California's judicially created definitions of "manufacturing"  
10 and "design defects" and the standards for determining whether there has been an  
11 actionable failure to warn are unconstitutional in that, among other things, they are void  
12 for vagueness and place an undue burden upon interstate commerce, as well as constitute  
13 an impermissible effort to regulate in an area that has previously been preempted by the  
14 federal government.

15                  **TWENTY-FIFTH AFFIRMATIVE DEFENSE**  
16                  **(NO MARKET SHARE OR ENTERPRISE LIABILITY)**

17         64. Defendant alleges, on information and belief, that each and every cause of  
18 action of Plaintiffs' First Amended Complaint fails to state facts sufficient to constitute a  
19 cause of action under *Sindell*, "market share", or any theory of enterprise liability.  
20 Defendant further alleges on information and belief that Plaintiffs have failed to join as  
21 defendants in this action the producers of a substantial market share of the product or  
22 products which allegedly caused or contributed to the injuries of which Plaintiffs  
23 complain.

24                  **TWENTY-SIXTH AFFIRMATIVE DEFENSE**  
25                  **(WORKERS' COMPENSATION – EXCLUSIVE REMEDY)**

26         65. Defendant alleges on information and belief that:

27                 A. Plaintiffs have received or will receive disability and medical benefits  
28 under a workers' compensation law, or similar laws, from Plaintiffs' employers or former

1 employers or their workers' compensation or similar insurers, on the basis that the  
2 injuries and damages allegedly sustained by Plaintiffs which give rise to this lawsuit  
3 occurred because Plaintiffs were performing their duties as employees of said employers  
4 and therefore Plaintiffs' claims are barred by the statue of limitations per 45 U.S.C.  
5 section 56 and the exclusive remedy provisions of California Labor Code section 3601, et  
6 seq.;

7           B.     At the time of any alleged injury, each and every of Plaintiffs'  
8 employers and former employers was careless and negligent about the matters alleged in  
9 Plaintiffs' First Amended Complaint, and said carelessness and negligence of each and  
10 every of said employers contributed directly and proximately to any alleged injuries or  
11 damages sustained by Plaintiffs; and

12 C. Any judgment or verdict that might be rendered in favor of Plaintiffs  
13 herein should be reduced by the amount of all such payments by said employers or  
14 insurers, and that each of said employers or insurers should be barred from any recovery  
15 by lien or otherwise in connection with this matter under the authority of *Witt v. Jackson*  
16 (1961) 57 Cal.2d 57.

**TWENTY-SEVENTH AFFIRMATIVE DEFENSE**  
**(MILITARY CONTRACTOR IMMUNITY)**

19       66. To the extent that Plaintiffs' vague allegations in the First Amended  
20 Complaint ultimately are specified through discovery and the litigation of this matter to  
21 allegedly arise related to any products and/or services connected to the U.S. military and  
22 U.S. government, Defendant alleges that it acted solely under the direction of a federal  
23 officer and pursuant to reasonably precise specifications of the U.S. government and  
24 properly performed all work thereunder according to such specifications in  
25 manufacturing and distributing any products for which Plaintiffs allege caused injury to  
26 Plaintiffs. Defendant further alleges that it provided any and all warnings required by  
27 said specifications and federal officer and that the U.S. government had knowledge of  
28 any health hazards relating to the handling and use of said products which was superior to

1 that of this Answering Defendant and that this Answering Defendant is therefore immune  
2 to suit under the military contractor immunity doctrine as set forth in *Boyle v. United*  
3 *Tech. Corp.* (1988) 487 U.S. 500, and *Sundstrom v. McDonnell Douglas Corp.* (N.D. Cal.  
4 1993) 816 F.Supp. 587.

5 **TWENTY-EIGHTH AFFIRMATIVE DEFENSE**  
6 **(STATE OF THE ART)**

7 67. The state of the medical, scientific, and industrial knowledge and practices  
8 was at all material times such that this Answering Defendant neither breached any  
9 alleged duty owed to Plaintiffs, nor knew, or could have known, that the product(s) it  
10 allegedly manufactured and distributed presented a foreseeable risk of harm to Plaintiffs  
11 in the normal and expected use of such a product. Any products, substances, or  
12 equipment designed, manufactured, formulated, sold, or distributed by this Answering  
13 Defendant were made consistent with the state of the art applicable to said products,  
14 substances, or equipment at the time of their design, manufacture, sale, formulation, or  
15 distribution.

16 **TWENTY-NINTH AFFIRMATIVE DEFENSE**  
17 **(APPLICABLE LAW)**

18 68. Defendant alleges that as between Plaintiffs and this Answering Defendant,  
19 the law applicable to this action is the law as it existed during the period that this  
20 Answering Defendant engaged, if at all, in the distribution or sale of the product which  
21 Plaintiffs claim caused injury. It is unlawful, inequitable, and in violation of this First  
22 Amended Answering Defendant's contractual, statutory, and constitutional rights to  
23 apply principles of law other than or in a manner different from those which existed for  
24 the period in which this Answering Defendant sold or distributed the products to which  
25 Plaintiffs claim exposure.

1                   **THIRTIETH AFFIRMATIVE DEFENSE**  
2                   **(OFFSET)**

3         69. This Answering Defendant is entitled to an offset regarding all settlements  
4 entered into, or to be entered into between Plaintiffs and any person or entity, including  
5 Defendant, relating to their claims and allegations in this proceeding.

6                   **THIRTY-FIRST AFFIRMATIVE DEFENSE**  
7                   **(FAILURE TO JOIN INDISPENSABLE PARTIES)**

8         70. Defendant alleges, on information and belief, that Plaintiffs have failed to  
9 join indispensable parties in this action pursuant to California Code of Civil Procedure  
10 section 389.

11                  **THIRTY-SECOND AFFIRMATIVE DEFENSE**  
12                  **(COLLATERAL ESTOPPEL, ISSUE PRECLUSION AND RES JUDICATA)**

13         71. Defendant alleges, on information and belief, that Plaintiffs' claims against  
14 this Answering Defendant are barred by the doctrines of collateral estoppel, issue  
15 preclusion and/or res judicata.

16                  **THIRTY-THIRD AFFIRMATIVE DEFENSE**  
17                  **(EXPRESS OR IMPLIED CONSENT)**

18         72. Defendant alleges, on information and belief, that Plaintiffs' claims against  
19 this Answering Defendant are barred because Plaintiffs expressly or impliedly consented  
20 to the conduct of this Answering Defendant described in Plaintiffs' First Amended  
21 Complaint.

22                  **THIRTY-FOURTH AFFIRMATIVE DEFENSE**  
23                  **(NO NOTICE OF BREACH OF WARRANTY)**

24         73. Defendant alleges, on information and belief, that Plaintiffs' claims for  
25 breach of warranty are barred due to the failure of the Plaintiffs to give prompt and  
26 reasonable notice to this Answering Defendant of any alleged breach of warranty  
27 resulting in Plaintiffs' alleged injuries.

1                   **THIRTY-FIFTH AFFIRMATIVE DEFENSE**  
2                   **(WAIVER OF RIGHTS)**

3       74. Defendant alleges, on information and belief, that Plaintiffs, by their acts,  
4 conduct and omissions, expressly or impliedly waived whatever rights they may have had  
5 against this Answering Defendant.

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8                   **THIRTY-SIXTH AFFIRMATIVE DEFENSE**  
9                   **(ESTOPPEL BASED ON CONDUCT)**

10     75. Defendant alleges, on information and belief, that Plaintiffs' claims against  
11 this Answering Defendant are barred because Plaintiffs engaged in conduct by reason of  
12 which Plaintiffs are estopped from asserting any claim against this Answering Defendant.

13                   **THIRTY-SEVENTH AFFIRMATIVE DEFENSE**  
14                   **(VIOLATION OF COMMERCE CLAUSE)**

15     76. Defendant alleges that the Commerce Clause of the United States  
16 Constitution, U.S. Const. art. I, section 8, cl. 3, precludes the application of a state statute  
17 to commerce that takes place wholly outside of a state's borders, whether or not the  
18 commerce has effects within the state; and protects against inconsistent legislation arising  
19 from the projection of one state regulatory regime into the jurisdiction of another state.

20                   **THIRTY-EIGHTH AFFIRMATIVE DEFENSE**  
21                   **(PLEAS IN ABATEMENT)**

22     77. Defendant alleges as pleas in abatement:

23                  A. That another action is pending between the same parties on the same  
24 cause of action; and

25                  B. Plaintiffs have improperly joined parties in this action.

1                   **THIRTY-NINTH AFFIRMATIVE DEFENSE**

2                   **(PUNITIVE DAMAGES – FAILURE TO STATE A CAUSE OF ACTION)**

3                  78. Defendant alleges that the First Amended Complaint in its entirety, and each  
4 cause of action therein, fails to state a cause of action against this Answering Defendant  
5 for punitive or exemplary damages.

6                   **FORTIETH AFFIRMATIVE DEFENSE**

7                   **(UNCONSTITUTIONALITY OF PUNITIVE DAMAGES)**

8                  79. Defendant alleges that, to the extent that it seeks exemplary or punitive  
9 damages pursuant to California Civil Code section 3294, the First Amended Complaint  
10 violates this Answering Defendant's right to procedural due process under the Fifth and  
11 Fourteenth Amendment of the United State Constitution, and Article I, section 7, of the  
12 California State Constitution, and therefore fails to state a cause of action upon which  
13 either punitive or exemplary damages can be awarded in that:

14                 A. Consideration of any exemplary damages in this action would allow  
15 standardless discretion to the jury to determine punishment, depriving this Answering  
16 Defendant of prior notice of the consequences of its action;

17                 B. The admission of evidence directly to the jury concerning this  
18 Answering Defendant's assets or net worth will create an undue risk of any proper verdict  
19 on each issue concerning liability, the measure of compensatory damages, whether to  
20 award punitive damages, and the measure of punitive damages;

21                 C. Exemplary damages, by their very nature, constitute punishment and  
22 are a quasi-criminal sanction for which the burden of proof should not be less than  
23 "beyond a reasonable doubt", not merely "a preponderance of the evidence" or "clear and  
24 convincing evidence".

25                   **FORTY-FIRST AFFIRMATIVE DEFENSE**

26                   **(PUNITIVE DAMAGES – EXCESSIVE FINES)**

27                  80. Defendant alleges that, to the extent that it seeks punitive or exemplary  
28 damages pursuant to California Civil Code section 3294, the First Amended Complaint

1 violates this Answering Defendant's right to protection from "excessive fines" as  
2 provided in the Eighth Amendment of the United State Constitution and Article I, section  
3 17 of the Constitution of the State of California, and violates this Answering Defendant's  
4 right to substantive due process as provided in the Fifth and Fourteenth Amendments of  
5 the United States Constitution and the Constitution of the State of California, and  
6 therefore fails to state facts sufficient to support an award of either punitive or exemplary  
7 damages.

## **FORTY-SECOND AFFIRMATIVE DEFENSE**

**(PUNITIVE DAMAGES—QUASI CRIMINAL SANCTION)**

10       81. Defendant alleges that exemplary damages are punishment, a quasi-criminal  
11 sanction, for which this Answering Defendant has not been afforded specific procedural  
12 safeguards prescribed by the Fourth, Fifth and Sixth Amendments of the United States  
13 Constitution and Article 1, Section 7 of the Constitution of the State of California.

## **FORTY-THIRD AFFIRMATIVE DEFENSE**

## **(PUNITIVE DAMAGES—EX POST FACTO)**

16        82. Defendant alleges that an award of punitive or exemplary damages would  
17 constitute an ex post facto law in violation of the United States Constitution and the  
18 Constitution of the State of California to the extent that such award is based on conduct  
19 which, at the time it was undertaken, would not have constituted acts sufficient to impose  
20 punitive or exemplary damages at law.

## PRAYER

26 WHEREFORE, having fully Answered, this First Amended Answering Defendant  
27 prays for judgment and relief as follows:

1. That Plaintiffs take nothing from this Answering Defendant by reason of the unverified First Amended Complaint;

2. That the unverified First Amended Complaint be dismissed as to this Answering Defendant;

3. For judgment in favor of this Answering Defendant and against Plaintiffs as to each and every cause of action listed in Plaintiffs' First Amended Complaint.

4. That this Answering Defendant be awarded its costs for this lawsuit, including its attorneys' fees;

5. That the trier of fact determine what percentage of the fault or other liability of all persons, entities or parties whose fault or other liability proximately caused Plaintiffs' alleged damages is attributable to each person;

6. That any judgment for damages against this Answering Defendant in favor of Plaintiffs be no greater than an amount which equals this First Amended Answering Defendant's proportionate share, if any, of the total fault or other liability which proximately caused Plaintiffs' damages;

7. That this Answering Defendant be awarded appropriate credits and setoffs arising out of any payment of workers' compensation settlements or other settlements and/or awards as alleged above; and,

8. That this Answering Defendant be awarded such other and further relief as the Court deems proper and equitable.

## **DEMAND FOR JURY**

Defendant hereby demands trial by jury of all claims so triable.

1 DATED: July 22, 2011  
2  
3

**TUCKER ELLIS & WEST LLP**

4 By: /s/ Anne Swoboda Cruz  
5 Anne Swoboda Cruz  
6 Attorneys for Defendants CARRIER  
7 CORPORATION and  
8 AVCO CORPORATION  
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**TUCKER ELLIS & WEST LLP**  
Cleveland • Columbus • Los Angeles • San Francisco

## CERTIFICATE OF SERVICE

I, Frank V. Provenzano declare that I am a citizen of the United States and a resident of Los Angeles, California or employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is Tucker Ellis & West LLP, 515 South Flower Street, Forty-Second Floor, Los Angeles, California 90071-2223.

On July 22, 2011, I served the following: **ANSWER OF AVCO CORPORATION TO FIRST AMENDED COMPLAINT** on the interested parties in this action by:

- (X) ELECTRONICALLY VIA ECF:** the above-entitled document to be served electronically through the United States District Court, Central District ECF website, addressed to all parties appearing on the Court's ECF service list. A copy of the "Filing Receipt" page will be maintained with the original document in our office.
- (X) U. S. MAIL:** I placed a copy in a separate envelope, with postage fully prepaid, for each address named on the attached service list for collection and mailing on the below indicated day following the ordinary business practices at Tucker Ellis & West LLP. I certify I am familiar with the ordinary business practices of my place of employment with regard to collection for mailing with the United States Postal Service. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit or mailing affidavit.
- I declare that I am employed in the office of the Bar of this Court at whose direction the service was made.
- (X) (FEDERAL)** I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on July 22, 2011 at Los Angeles, California.

Frank V. Provenzano

## **SERVICE LIST**

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